No. 76-1246

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT W. EMERSON AND JOHNNY M. HILL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals issued no opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1977. A petition for rehearing was denied on February 14, 1977. The petition for a writ of certiorari was filed on March 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in refusing to ask members of the jury panel on *voir dire* to state their religious preference.

2. Whether petitioner Emerson's sentence was lawful.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of possessing goods stolen from an interstate shipment, in violation of 18 U.S.C. 659. Petitioner Hill was sentenced to imprisonment for four years, six months of which was to be served in confinement, with the balance suspended. Petitioner Emerson was sentenced to imprisonment for three years (Tr. 857-858). The court of appeals affirmed by a *per curiam* order (Pet. App. A).

In March 1975, co-defendant Vaughn contacted petitioner Emerson, owner of a butchering establishment near Dallas, Texas, concerning the disposition of some stolen beef that he expected to have the following week. Emerson indicated interest, and Vaughn talked with petitioner Hill, an employee of Emerson, about the matter (Tr. 46, 62-63). On March 16, co-defendants Archer and Roberts, using a truck belonging to one Young, received some 37,000 pounds of beef in Plainview, Texas, which was to be delivered to a packing house in Chicago, Illinois. They drove the truck to Dallas and notified Vaughn (Tr. 55-57, 223-224, 363). Thereafter Vaughn, Archer, Roberts, and one Sims met petitioner Emerson near the latter's place of business. Emerson rejected Vaughn's quoted price of 55 cents a pound, claiming he could buy legitimate meat for less than that. When Vaughn lowered the price to 35 cents a pound, Emerson agreed to have the beef inspected. Emerson was assured that there would be a delay in reporting the theft, so that he would have time to move the meat (Tr. 58-70, 158-159, 226-229, 365).

After Hill inspected and approved the beef, all but a small quantity was delivered to Emerson's place of business on the night of March 19 (Tr. 73-79, 82-101, 145, 163-177, 224, 237, 302-305, 367-375). Emerson paid only 25 cents a pound,

making payment in $20 bills (Tr. 101). When Young, the owner of the truck, informed Vaughn that he had reported the shipment as stolen, Vaughn got in touch with Emerson, who said that he had already moved the meat (Tr. 103).

ARGUMENT

1. Before *voir dire* of the jury panel, the court refused a defense request to ask the veniremen their religious affiliations. The colloquy on this issue was as follows (Tr. 8-9):

> THE COURT: Probably the only other question that you have down here that I won't ask, Mr. McCorkle—I say, about the only question here that I see that I am not going to ask is the religion of each one of them. Now, is there any special reason that you want that?
>
> MR. McCorkle: No, Your Honor, it's just a matter of a habit of mine.
>
> THE COURT: All right. Well, I think that the rest of that I will ask.

The well recognized discretion of the trial court in these matters was not here abused, especially in the absence of any specific reason for the request. Petitioner concedes that religion was not an issue in the case (Pet. 8 n. 1), and fails to suggest how answers to such a question could have assisted him in the exercise of his peremptory challenges. "The Constitution does not always entitle a defendant to have questions posed during *voir dire* specifically directed to matters that conceivably might prejudice veniremen against him." *Ristaino* v. *Ross*, 424 U.S. 589, 594. As the court ruled in *Yarborough* v. *United States*, 230 F. 2d 56, 63 (C.A. 4),

certiorari denied, 351 U.S. 969, in considering a similar claim:

> No matter of any religious significance whatever was involved in the case; and appellant does not show how he could have been prejudiced in any way by the refusal of the judge to make inquiry of the jurors as to a private matter of this sort. There is nothing to show that he belonged to any religious sect or was charged with a crime as to which any sect held views different from the rest of mankind * * *.

See also *Pope* v. *United States*, 372 F. 2d 710, 725-727 (C.A. 8); *Gold* v. *United States*, 378 F. 2d 588, 594 (C.A. 9). Indeed, the inability of counsel to assign any reason for propounding such a question to the venire was sufficient ground to refuse the request. *Connors* v. *United States*, 158 U.S. 408, 415.

This Court's recognition in *Swain* v. *Alabama*, 380 U.S. 202, 220 that peremptory challenges are "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned to jury" does not change this result. The trial court has ample discretion to limit *voir dire*. That discretion was not abused here.

2. Petitioner Emerson challenges the sentence imposed on him on several grounds. He claims the sentence was cruel and unusual punishment because it was more severe than that imposed on his assertedly more culpable co-defendants (Pet. 14); he also claims the sentence was increased over what it would otherwise have been because he exercised his right to trial (Pet. 10-12), and because he continued to assert his innocence at the sentencing hearing (Pet. 12-13).

a. Petitioner's contention that his sentence was unduly harsh does not present an issue worthy of review by this Court. His three-year sentence was well below the statutory maximum of ten years' imprisonment and a $5,000 fine. See 18 U.S.C. 659. Furthermore, petitioner is wholly incorrect in asserting that his co-defendants were more culpable than he. There were eight people involved in the case. Three of them—Steven Vaughn, Robby Joe Harden and Bobby Sims—were teenagers who merely earned some money by unloading the beef from the truck into petitioner Emerson's store. (Tr. 318-360, 307-318, 156-221). Indeed, Sims testified he did not even know the beef was stolen (Tr. 183). These peripheral actors were apparently not charged.[1] James Archer drove the load of meat from Plainview, Texas, to petitioner's store and knew the beef was stolen (Tr. 221-247, 270). Archer pleaded guilty to charges arising out of the theft and received "a three-year probated term" (Tr. 37-38). Petitioner Hill was a 27-year old employee of petitioner Emerson (Tr. 730-730A) whom the court found to have been "too easily influenced" by Emerson (Tr. 858); Hill received six months' imprisonment and three and one half years' probation (*ibid.*). Emerson, who operated three beef stores (Tr. 609) and purchased the meat involved in this case knowing it to have been stolen, was sentenced to three years' imprisonment.[2]

We believe it is entirely reasonable that a substantial businessman who knowingly provides an outlet for disposal of stolen goods—and whose role is just as critical to the criminal activity as that of the thieves themselves—should receive a sentence such as that imposed on

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[1]Sims testified he was not charged (Tr. 157). Petitioner states that Steven Vaughn and Robby Harden were not charged (Pet. 5).

[2]Two other defendants, Roberts and Max Vaughn, had not been sentenced at the time petitioner was sentenced, and this record does not reveal the ultimate disposition of their cases.

petitioner Emerson here, while those who handled the goods in transit after their theft receive lesser sentences. The matter is within the sound discretion of the trial court.

b. The following exchange took place at the sentencing hearing (Tr. 853-854):

> Q (By the Court) Mr. Emerson, would you like to speak?
>
> A Yes, Your Honor. I would like to say that at this point, I am terriby disappointed and confused, because I have been convicted of a criminal case of which I am innocent. And I am a little bit disturbed at myself that I took this matter so lightly for so long, because I thought that sooner or later the truth or the lack of the truth would come to the surface. I guess I had this conviction because of the way that I was reared, that the truth would always come first. But as I left the Courtroom here about a month ago I realized on that particular incident that the truth did not quite win out, as they showed in eight hours of deliberation over a simple matter as did we steal it or not.
>
> But since that time the truth, I think, has won, in that I know myself, my family has convinced me that they also know the truth, and my friends.
>
> Q What are you saying to me, Mr. Emerson, that the jury verdict was not correct?
>
> A That's right, Your Honor.

The court questioned Emerson about financial matters, and Emerson's attorney addressed the court, asking for

a sentence of probation (Tr. 854-857). The following colloquy then occurred (Tr. 857):

> THE COURT: All right. Mr. Emerson, will you stand up, please?
>
> Now, Mr. Emerson, I believe that the jury verdict was correct, and I think that until you understand that it was correct you are never going to change. I don't like the way you have conducted your business. You are not, in my opinion, a person for probation. But I think if I put you on probation you would go ahead and do the same thing that you have been doing.

A sentence of three years' imprisonment was then imposed.

While we agree that a court cannot in sentencing penalize the defendant for exercising in good faith his right to trial (see, *e.g., United States* v. *Wiley*, 267 F. 2d 453 (C.A. 7)), there is no indication on this record that the court acted out of such motive. Unlike in *Wiley, supra,* where the district court announced its "standing policy" that it would not consider an application for probation from a defendant who pleads not guilty and stands trial (267 F. 2d at 455), this record is devoid of any indication that the trial court based its refusal to grant probation on petitioner's exercise of his right to trial. Petitioner, in apparent recognition of the absence of any evidence to support his claim, argues only that there can be "no other reason" to explain the disparity between the sentence given to him and those given his co-defendants who pleaded guilty (Pet. 12). But if a showing of a sentencing disparity alone were sufficient to make out an abridgement of the right to trial, no court could ever award a defendant who went to trial to a sentence more severe than it had awarded a co-defendant who pleaded guilty. Such a proposition is obviously untenable; it ignores degrees of culpability and would if adopted deprive the sentencing

court of much of its traditional discretion to tailor the punishment to the criminal as well as to the crime.[3]

3. Petitioner fares no better with his argument that his sentence was made more severe because he maintained his innocence before the court at the sentencing hearing; this, he asserts, infringed his right against compelled self-incrimination (Pet. 12-13). In the first place, of course, petitioner was not compelled to restate his belief in his innocence or to say anything at all. The court asked him if he "would * * * like to speak" (Tr. 853), and thus his statement was entirely voluntary.

Nor has petitioner demonstrated that, quite apart from consideration of his right against self-incrimination, his

[3]Although none would dispute the proposition that a defendant should not be penalized at sentencing for demanding that the prosecution carry its burden of proving his guilt at a trial, the converse of this proposition—that no defendant should be shown leniency on account of a willingness to plead guilty—does not necessarily follow. A plea of guilty, in addition to conserving the scarce resources of the criminal justice system, may often be viewed by the sentencing judge as reflecting a recognition of wrongdoing by the defendant, an expression of contrition for his acts, and a start on the path to rehabilitation—all factors that are generally recognized as legitimate bases for ameliorating a sentence.

But these are, of course, two sides of the same coin, so that what appears in the case of many guilty-pleading defendants to be a reasonable recognition of factors justifying some extension of leniency appears to their co-defendants who have stood trial and received a heavier sentence to be the infliction of a penalty for the exercise of a right. We believe that in cases exhibiting such disparities an appellate court may properly afford relief only where there is, as in *Wiley*, concrete evidence that the sentencing judge has applied some policy plainly embodying a penalty for refusing to plead guilty, and petitioner has cited no cases holding otherwise. In the instant case, petitioner can point to no evidence other than the disparity itself (which may in any event be accounted for by the sentencing judge's perception of defendants) to suggest that his sentence contains an element punishing him for insisting upon trial.

sentence was made more severe because he chose to reassert his innocence. As the colloquy quoted above shows, the court denied probation because "if I put you on probation you would go ahead and do the same thing that you have been doing" (Tr. 857). Thus, the refusal to place petitioner on probation was a permissible exercise of the court's discretion. Although the court did remark that "until you understand that [the verdict] was correct you are never going to change" (*ibid.*), its decision to refuse probation cannot be said to rest on that ground. Even if it did, the sentence would not be subject to challenge. If a court can properly consider a defendant's remorse as a factor in mitigation of punishment, it necessarily may consider the absence of remorse implicit in a continued assertion of innocence in refusing to mitigate. See footnote 3, *supra*.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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